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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1466

BOSTON HOME AND SCHOOL ASSOCIATION,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
JOHN J. KERRIGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS TALLULAH MORGAN, ET AL., IN OPPOSITION

Tallulah Morgan, et al., black parents and their children attending the Boston public schools, oppose the Boston Home and School Association's petition for certiorari. Respondents Morgan, et al. are also authorized to represent that plaintiff-intervenors El Comite de Padres Pro Defensa de la Educacion Bilingue, which represents Hispanic school children and their parents, oppose a grant of certiorari for the reasons set forth in this Brief and in the Briefs in opposition to the Petitions in Nos. 75-1441 and 75-1446.

Opinions Below

The opinion of the United States District Court for the District of Massachusetts, from whose affirmance in the Court of Appeals review here is sought, is not reproduced in the Petition. The petition correctly states that the opinion is reported at 401 F. Supp. 216; that report contains omissions noted at 401 F. Supp. at 252, 256, 260, 261, 270. The complete opinion is reproduced in the Appendix to the Petition of John J. McDonough, et al., No. 75-1445, pp. 57-207, and will be cited as "No. 75-1445, A." The Court of Appeals' opinion is reproduced in the petition, and will be cited as "A-".

Statement of the Case

Some important facts are needed to supplement the Petitioner's presentation.

1. The Petition's claim (pp. 5-6, 15-16) that the District Court's findings of system-wide segregation in the Boston public schools at the liability phase of this action were "unanticipated" and deprived the defendants of the opportunity to respond to *Keyes* v. *School Dist. No. 1, Denver,* 413 U.S. 189 (1973), was rejected below by the District Court (A-4; transcript, 2/5/75, pp. 65-70) and the Court of Appeals (A-32 n. 26). The latter court said:

> "We find this suggestion utterly without merit. The effect of *Keyes* was before the district court during the trial on liability, it having been decided on June 21, 1973, a time when that trial had been reopened. The School Committee did not seek a reopening on the issues presented by *Keyes;* it described *Keyes* as a restatement of the principles of the earlier Supreme Court decisions. In any event, the district court found

> that the record was sufficiently complete to apply *Keyes,* 379 F. Supp. at 479, and that finding was not challenged on appeal." A-32 n. 26.

Most of this Petition depends on this attempt to relitigate an issue which both lower courts found to have been litigated once, at the liability stage, by the Boston School Committee's able counsel (James St. Clair, Esquire, and the firm of Hale & Dorr).[1]

2. While the Petition discusses the theories which it sought to raise below, it does not describe the plan embodying those theories, which would have left massive segregation in the Boston public schools. Under the plan's own projections, at least 75 out of about 159 schools would have been less than 35% white or more than 75% white. Schools more than 90% or less than 10% white were found in Roxbury (Home and School Association plan, Appendix, pp. 8-10, 12, 81, 106, 119), Dorchester (pp. 54-57), South Boston (p. 66), Hyde Park (p. 68), West Roxbury (pp. 70, 72, 117), Charlestown (pp. 78, 94, 134), East Boston (pp. 80, 90, 138), the South End (pp. 4, 63), and the Fenway (p. 6).[1a] These are conservative estimates: schools whose districting is not specifically described in the plan would probably also, under its principles, be segregated. The plan, moreover, left in effect most of

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[1] This Petitioner became a defendant-intervenor on December 27, 1974, subject to the District Court's limitation that issues decided by that Court's opinion of June 21, 1974, were not to be relitigated. Nevertheless, Petitioner has continually sought to reargue that the scope of the violation was more limited than the finding of the District Court, and, *a fortiori*, that the Courts below erred in affording near-comprehensive relief. Regardless of the limitations upon intervention, and of the inappropriateness in any event of relitigation now of the District Court's violation finding, this view of the violation is simply wrong on the record. And in an effort to reinter this spectre, we summarize the violation finding, as to which this Court has previously denied certiorari. *Kerrigan* v. *Morgan* and *White* v. *Morgan,* 421 U.S. 963 (1975), in an Appendix to this Brief.

[1a] Many of the pages cited describe more than one such school.

the State Plan originally imposed under state law (see No. 75-1445, A. 62-63), while arguing that that plan went "far beyond" (p. 3) the remedy called for by the Petitioner's remedial theories, and should be replaced as soon as possible by a still less inclusive plan.

This is the result to which the Petition's theories lead, even in a school system in which the District Court found that the authorities "knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities. . . ." And that "the entire school system of Boston is unconstitutionally segregated." *Morgan* v. *Hennigan,* 379 F. Supp. 410, 482 (D. Mass.), *aff'd,* 509 F.2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975). It is not a result required by practicalities: the District Court was able to frame a plan desegregating the schools without any unusual length or quantity of busing, while offering students a choice between schools in their own community school districts and citywide magnet schools (No. 75-1445, A. 85-86, 88, 92, 184-87; A-3-9-40). As the Petition's Appendix E shows, black residential areas in Boston form an elongated, central band no part of which is far from white areas. Rather, the Petitioner argues that, regardless of practicalities, a court simply has no power to seek meaningful, system-wide relief even on the overwhelming showing of segregative acts found in this case supporting the District Court's finding of system-wide segregation affecting "the entire school system".

Argument

I. The Association's Theories as to the Scope of the Violation Are Untimely, Inappropriate for Consideration by This Court, and Baseless.

The first three sections of the Petition center around the same claim: that even when intentional segregative acts substantially affecting schools have been shown, the

court should not "make every effort to achieve the greatest possible degree of actual desegregation" (*Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 26 (1971)) but should rather calculate the racial composition each school would have had absent unconstitutional acts and desegregate only to the extent needed to reach that composition. The factual premises of this theory were rejected in this case at the violation stage. In any event the Petition's arguments are not appropriate on this record for consideration by the Court and are wholly inconsistent with this Court's decisions.

A. *The Factual Premises of the Petition's Theory Have Been Rejected.*

At the violation stage of this case, the District Court found multiple and pervasive unconstitutional practices "affecting all of the city's students, teachers and school facilities" and yielding unconstitutional segregation of "the entire school system of Boston"; it concluded that the defendants did not "produce 'evidence supporting a finding that a lesser degree of segregated schooling' in any part of the system would not have resulted even if they had not acted as they did". 379 F. Supp. 481-82, quoting *Keyes,* 413 U.S. at 211. The District Court thus found that the defendants—not residential patterns—are responsible for the segregation of the Boston schools, 379 F. Supp. at 469-74. These findings were based on detailed evidence of discrimination in school construction, portable classroom location, districting, overcrowding policies, feeder patterns, transfer policies, teacher hiring and assignment, and other practices. 379 F. Supp. at 425-69.

The Petition's present attempt to fractionate segregation in the Boston schools, attributing most of it to private action (pp. 9-11, 15-16), is barred by these findings reached in an earlier part of the case and affirmed on appeal. The Petitioner cannot challenge these findings, not only be-

cause of familiar principles of res judicata and law of the case, but because the terms on which it was allowed to intervene expressly forbid it to "reopen any question or issue which has been decided previously by the court, including the findings of fact and conclusions of law in the court's opinion of June 21, 1974" (Order Allowing Intervention, 12/27/74).

The Petition's claim (pp. 5-6, 15-16) that the previous findings should be reopened because the defendants at the violation stage had no chance to rebut the *Keyes* presumptions presents no issue warranting certiorari. The claim was rejected by the District Court which tried the case (A-4; transcript, 2/5/75, pp. 65-70) and termed "utterly without merit" by the Court of Appeals (A-32 n. 26). This Court should not review such a procedural finding since it is entirely devoid of general importance.

The finding, in any event, is plainly correct. *Keyes* was decided on June 21, 1973, when this case had been reopened to hear evidence relating to English High School. See 379 F. Supp. at 416. On July 3, the School Committee successfully moved to reopen as to various recent developments, but did not seek to introduce evidence as to *Keyes*. City Defendants' Motion to Reopen Record; City Defendants' Supplementary Requested Findings of Fact (7/3/75). On July 5, the District Court specifically requested argument on *Keyes* (transcript, 7/5/73, pp. 180-81). On July 13, the argument occurred, and School Committee counsel made no claim of surprise and sought no reopening. On the contrary, he described *Keyes* as "a restatement by the Supreme Court of the principles which are found in the earlier decisions of the Court" (transcript, 7/13/73, p. 38).[2] The District Court subsequently found the record sufficiently full to apply *Keyes* (379 F. Supp. at 479), and this was not challenged on appeal.

[2] Nor were any *Keyes* claims included in a later, unsuccessful motion to reopen. 379 F. Supp. at 416.

The specific claims raised by the Petition were rejected in the District Court's decision on the scope of the violation, which the Court of Appeals affirmed and this Court declined to review. The dispute then was not whether Boston's schools were segregated, but how they got that way. 379 F. Supp. at 425. The School Committee advanced the traditional defense "that the present segregation is not a product of their intent, but is 'due to factors over which the city defendants have had and have no control, or is due to the policy of providing neighborhood schools'" (509 F.2d at 584). The rejection of this defense on the basis of appropriate evidence (379 F. Supp. at 469-74) was nothing new. E.g., *Taylor* v. *Bd. of Educ.*, 294 F.2d 36, 39 (2nd Cir.), *cert. denied*, 368 U.S. 940 (1961). Nor was it new to prove a systemwide violation without presenting direct evidence as to every student. E.g., *Keyes*, 413 U.S. at 200, 209-10 (citing cases); *Kelly* v. *Guinn*, 456 F.2d 100 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973).

Even the evidence described in the Petition repeats and is refuted by evidence already considered by the District Court at the violation stage. The Petition argues (pp. 10-11) that the School Committee had a "policy" of avoiding busing, but does not mention the District Court's finding that — policy or no policy — in 1972 more than 30,000 students used busing or public transportation to reach school. 379 F. Supp. at 456 n. 31; No. 75-1445, A. 92. (The plan now appealed from buses only 21,000 students for periods averaging 10-15 minutes (A-6, 20), making still more inappropriate the Petition's claim (pp. 14-15) that the lower courts have "callously" required "the involuntary transportation of thousands of elementary students".) The Petition explains (pp. 9-10) that in Boston white schools are typically in white neighborhoods, and black schools in black neighborhoods, but does not mention that tens of schools, and tens of portable classrooms, were deliberately placed

in white or black neighborhoods to maximize segregation (379 F. Supp. at 427-30, 469-73) and that Boston's reliance on a neighborhood school assignment system was selective and was manipulated to promote segregation (379 F. Supp. at 432-38, 449-56, 473-75).[3]

What is said here is not inconsistent with *Swann*'s recognition that predominantly one-race schools may be explained by a showing that they did not result from past or present governmental discrimination. 402 U.S. at 26. The School Committee had its opportunity to make such a showing at the violation stage, under the standards set forth by *Keyes*, it tried and failed to do so, and neither it nor the Petitioner is entitled to a second chance.[4] See A-25-26. Nothing in *Swann* even suggests that a party allowed to intervene on terms that forbid relitigation of past issues is free to disregard those terms.

B. *The Petition's Theory Should Not Be Reviewed, and It Is Plainly Wrong.*

The Petition's theory that courts should compute the racial percentage schools would have had absent unconstitutional acts, and then seek to restore it, should not be reviewed on this record. For one thing, at the violation stage the District Court found systemwide violations "affecting all of the city's students" and "the entire

[3] Evidence much like what the Petition describes was found inadequate to rebut the *Keyes* presumptions in *Keyes* v. *School Dist. No. 1*, 521 F.2d 465, 472 (10 Cir. 1975), *cert. denied*, ___ U.S. ___ (1976).

[4] The Massachusetts legislature, incidentally, has authorized payment of this Petitioner's legal fees in this case by the City of Boston, finding that the Petitioner is "an agency within the school department". 1975 Mass. Acts, ch. 716. This makes still less plausible the Petitioner's suggestion (p. 16) that it should not be bound by the violation findings made at a time when the School Committee and Superintendent were parties.

school system" (379 F. Supp. at 482); and complete desegregation is thus required even on the Petition's own theory. As applied to the Boston school system by the Petitioner's own plan, moreover, that theory yields results which wholly discredit it. It would lead to massive remaining, court enforced segregation, despite the absence of practical impediments to desegregation and the pervasive constitutional violations found by the courts. (See Statement of the Case, part 2, above.) The District Court here approved a plan which did not seek or achieve racial balance (A-20, 39, 40; No. 75-1455, A. 74, 78), and which offered students a choice between schools in their community school districts and citwide magnet schools (No. 45-1445, A. 84-86). For this Court to uphold the Petition's theory in this case would be an utter rejection of the goal of desegregating unconstitutionally segregated school systems, and would subject to question the legality of dozens of plans adopted by lower courts on the authority of *Swann* and other cases.

There should be no question that the Petition's theory is inconsistent with this Court's decisions. *Keyes* made it clear that if segregative acts were "*factors* in causing the existing condition of segregation in" schools, "all-out desegregation" of those schools is required. 413 U.S. at 214 (emphasis added). The issue is whether "current segregation is in no way the result of those past segregative actions" 413 U.S. at 211 n. 17; see *id.* at 212 ("create or contribute to"). While the Petition discusses *Keyes* only in connection with its attempt to relitigate the violation findings in this case (pp. 5-6, 15-16), the whole drift of its argument is that *Keyes'* focus on identifying unconstitutionally segregated schools and parts of school systems (413 U.S. at 195-98, 203, 207-09) should be replaced by an attempt to fractionalize segregation within

schools. Even when a court, properly applying *Keyes,* has found systemwide segregation at the violation stage, the Petition (pp. 11-12) would allow segregation to continue where it could be shown at the remedy stage that white schools were in white residential areas.

Even before *Keyes,* it was clear that, once a school has been significantly affected by the segregatory practices of school officials, that school must be desegregated to the extent practicable, not just desegregated to some fractional extent. In *Davis* v. *Bd. of School Comm'rs,* 402 U.S. 33 (1971), this Court remanded for the attainment of "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation", even though under the plan approved by the Court of Appeals the remaining black schools were "the result of neighborhood patterns" (430 F.2d 883, 888 (5th Cir. 1979)). In *Swann* too, the Court dealt with state action "creating or *maintaining*" segregation (402 U.S. at 21, 28 (emphasis added)), and did not attempt to disentangle the percentage of segregation at each school resulting from state action. The Court was well aware of residential segregation (402 U.S. at 25), but nevertheless upheld a remedy desegregating the whole system.[5] Lower courts have reached similar results. *Kelly* v. *Guinn,* 456 F.2d 99, 108 n. 9 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973); *Keyes* v. *School Dist. No. 1,* 521 F.2d 465, 476-77 (10th Cir. 1975), *cert. denied,* —— U.S. —— (1976); A-26 n. 20 (citing cases). The goal is not to readjust racial percentages but "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Green* v. *County School Bd.,* 391 U.S. 430, 442 (1968).

[5] See also *Hills* v. *Gautreaux,* 44 U.S.L.W. 4480 (1976). The violation here was citywide; all the Boston public schools are controlled by a single school committee (379 F. Supp. at 421-22, 480-81).

The reasons for this result were cogently set forth by the Court of Appeals (A-28-31). To say what the racial composition of schools would have been absent discrimination is impossible, particularly when school officials have not followed a neighborhood school policy, and where their own acts (e.g., school placement) have influenced segregated residential patterns. *Swann,* 402 U.S. at 20-21; *Keyes,* 413 U.S. at 201-04. Here, for instance, some discriminatory practices (e.g., teacher assignment and student transfer policies) pervaded the whole system, while even the more localized violations affected dozens of schools. 374 F. Supp. at 426-30, 433-37, 442-45, 459, 466-68, 472. To desegregate by fractions would leave many individual black children, victims of segregation, in segregated schools, since even the Petitioner does not claim that it can tell where individuals would have been absent discrimination. It would involve the court in carefully preserving all supposedly untainted remnants of segregation. And it would disregard the impact that intentional state action imprinting a racial stamp on schools has on the "hearts and minds" of students in those schools, even on students who have not themselves been moved from one neighborhood to another. See *Brown* v. *Bd. of Educ.,* 347 U.S. 483, 494 (1954); *Wright* v. *Council of the City of Emporia,* 407 U.S. 451, 465-66 (1972); *Keyes,* 413 U.S. at 196.

C. *No Issue Calling For Review Has Been Raised Under the Equal Educational Opportunities Act of 1974.*

The Petition's argument (p. 13) that the Equal Educational Opportunities Act of 1974, and in particular 20 U.S.C. § 1712, prohibits "busing based on a broad-brush presumption" (i.e., *Keyes*) should not be considered at

this stage of the case. The Petition contends (p. 14) that "the Court of Appeals emasculates this clear Congressional statement of national policy by interpreting the Act to require no examination of the 'scope' or extent of the constitutional wrong which needs to be remedied". But consideration of the "scope" of the violation here took place at the violation stage of this case, when it was concluded that "all of the city's students, teachers and school facilities", were affected by unconstitutional practices. 379 F. Supp. at 482. This conclusion was based partly on *Keyes,* but it was mainly on massive, more direct evidence of intentional segregation. See 379 F. Supp. at 481. Nothing in the Act even purports to require relitigation of the violation at the remedy stage.[6]

In any event, the Act does not seek to shrink the nature or scope of constitutional violations. 20 U.S.C. § 1712, on which the Petition relies, says only that the courts should use "only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the law", but nowhere attempts to define what a "particular denial" is. The Act twice states that its purpose is to "specify appropriate *remedies*" for constitutional violations (20 U.S.C. §§ 1701(b), 1702(b) (emphasis added); see also §§ 1712, 1713). Neither the Act nor its legislative history purports to modify the *Keyes* standards for appraising violations.

If anything, the Act *supports* continued adherence to preexisting standards of unconstitutionality, including *Keyes.* The Act provides that "the rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public

[6] The Act does contain a carefully limited provision, inapplicable here, which allows reopening of remedial busing orders harming health or education (20 U.S.C. § 1717).

schools shall be uniform throughout the United States" (20 U.S.C. § 1753), a provision whose reenactment (see P.L. 92-318, § 805) apparently endorses *Keyes'* recognition of nationwide rules of law for the appraisal of violation claims.[7]

Moreover, the Act provides that "the provisions of this title are not intended to modify or diminish the authority of the courts of the United States to enforce fully the Fifth and Fourteenth Amendments" (20 U.S.C. § 1702(b)). See *Brinkman* v. *Gilligan,* 518 F.2d 853, 856 (6th Cir. 1975). This language is wholly inconsistent with the Petition's theory that the Act seeks to render constitutional practices found unconstitutional on the basis of *Keyes.* And of course, Congress has no power, even if it wished to, to legalize unconstitutionally segregated schools. *Katzenbach* v. *Morgan,* 384 U.S. 641, 651 n. 10 (1966); see *Oregon* v. *Mitchell,* 400 U.S. 112, 128-29, 204 n. 31 (1970); *United States* v. *Scotland Neck City Bd. of Educ.,* 407 U.S. 484 (1972); *North Carolina Bd. of Educ.* v. *Swann,* 402 U.S. 43 (1971); *Cooper* v. *Aaron,* 358 U.S. 1, 18 (1958).

The District Court faithfully implemented the Act: by minimizing busing; by using magnet schools, school closing and construction, and student transfer as alternative remedies; and by providing for community school districts (No. 75-1445, A. 84-86, 92-93, 104-08, 132, 136, 152-53, 171, 184-85). The Court of Appeals thoroughly reviewed compliance with the Act (A-14-22, 31 n. 24, 51). No significant issue remains for consideration by this Court.

[7] The Act also creates a statutory cause of action for denial of equal education opportunity which may in some respects go beyond *Keyes.* 20 U.S.C. § 1703 (forbidding *inter alia* certain segregation on the basis of sex or national origin, and failure to overcome language barriers).

II. No Issue Warranting Review Is Raised Concerning the Examination Schools.

The District Court's interim requirement that at least 35% of the 1975 entering class at three examination schools be black or Hispanic (A-41-44) raises no issue warranting review here.

The order was a one-year measure, based on the absence of practical alternative means of desegregation. The examination schools had been found unconstitutionally segregated at the violation stage (379 F. Supp. at 466-68; 509 F.2d at 593-94), while the advanced work classes which provided at least 25% of their student body (A.44 n. 37) were also segregated and predominantly white (379 F. Supp. at 433 & n. 16; 509 F.2d at 594 n. 20). Various proposals presented by the defendants relied on an unvalidated examination[8] and were unsupported by any data showing their actual effect on the schools' compositions, while such evidence as was available suggested that they would not desegregate the schools (No. 75-1445, A. 101-02). The District Court therefore adopted a percentage minimum for the coming year, while encouraging the development of alternatives thereafter (No. 75-1445, A. 102, 162; A-44).

Because the order part was interim and part of a system-wide desegregation plan, it raises no issues as to the propriety of "quotas" in other areas. At the most only whether the District Court abused its discretion is involved. As the School Committee has not suggested that it will throw out the black students admitted under this

[8] The Petition argues, that lack of validation is irrelevant when admission to a program requiring academic ability is involved (p. 18). Surely, however, one cannot assume that *any* entrance test measures the ability required for *any* program. Desegregation courts have always regarded with suspicion attempts to maintain segregation by the use of "objective" tests. E.g., *McNeal* v. *Tate County School Dist.*, 508 F.2d 1017 (5th Cir. 1975) (citing cases).

order should this Court reverse, the dispute may now be moot. *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). Since this Petition was filed, in fact, the District Court has issued plan modifications for 1976-77, which do *not* carry forward the 35% requirement. In future years, moreover, the situation may be modified by new state regulations, which provide:

> Because selective secondary schools have had atypical student bodies in the past, such selective secondary schools, including but not limited to selective academic high schools, regional vocational-technical schools and trade schools, shall admit qualified applicants of each sex and racial and ethnic groups in numbers proportionate to the existence of members of such class in the secondary school population of the geographic area served by that school. After the period for application to the school has closed, if it is found that qualified applicants of one of the above classes have not applied in numbers sufficient to maintain this proportion, qualified students of the other categories may be selected to fill the remaining openings.[9]

In any event, the order was plainly proper. It was not based on any theory that the plaintiffs have a substantive constitutional right to have schools contain a percentage of black students equal to their percentage in the school system. The District Court rejected any such theory (No. 75-1445, A. 74, 78) and provided for schools ranging from 30% white to 70% white to 95% white in East Boston (A-20, 39, 40). The 35% minimum which it fixed at the examination schools was smaller than the percentage of

[9] Chapter 622 Regulations Pertaining to Access to Equal Educational Opportunity, adopted by Mass. Bd. of Educ. June 24, 1975, effective September 1, 1975.

black and Hispanic students in Boston (A-41 n. 33; see A-42 n. 34). The burden was on those proposing less effective measures to show their propriety (*Swann,* 402 U.S. at 26; *Green* v. *County School Bd.,* 391 U.S. 430, 439 (1968)), and that burden was not carried (A-43-44). Suspicion of exclusive reliance on unvalidated tests to select entrants was particularly appropriate here, where the authorities had not only segregated black students but also provided them with inferior teachers (A-30), harming their ability to compete. See *Gaston County* v. *United States,* 395 U.S. 285 (1964). The 35% minimum, moreover, was limited to entering classes, while the other classes at these schools remain overwhelmingly white (No. 75-1445, A. 100; A-42). To take this moderate desegregative step, in the absence of effective alternatives or of data validating the status quo, was well within the court's power.

The court, furthermore, had to prepare a plan for an entire school system, after the local authorities had repeatedly defaulted (A-3-4, 13, 49-50, 56-57). All reasonable means were available to the court. *Hills* v. *Gautreaux,* 44 U.S.L.W. 4480, 4484 (1976). A vital part of the plan was the use of magnet schools to encourage voluntary desegregation (No. 75-1445, A. 84, 158-77). To have maintained the examination schools—among the largest and most magnetic in the system—in their overwhelmingly white status[10] would have seriously impaired the plan's desegregative power by providing a haven for white students seeking white schools (see A-41). These schools, themselves unconstitutionally segregated, had no right to detach themselves from the remedial process going on in the system. And since they draw students from throughout

[10] Two of these schools were 7% and 10% black and Hispanic. The third was about 30% black and Hispanic, but by the same token relatively unaffected by the court's 35% minimum. No. 75-1445, A. 100.

Boston, no "neighborhood" or transportation considerations militated against attainment of the court's moderate minimum.

III. No Issue Warranting Review Is Raised Concerning "White Flight."

One wholly adequate ground for the lower courts' refusal to consider "white flight" from the Boston public schools was their conclusion that the likelihood that school desegregation would accelerate such flight had not been established. White students were leaving the Boston schools long before desegregation began. The District Court found that it would be "presumptuous" to predict the effect of desegregation plans on long-term population movements, citing the similar conclusion of the Masters (who heard expert testimony on the subject). No. 75-1445, A. 81 n. 7.[11] The Petitioner tried to upset this conclusion in the Court of Appeals with affidavits, but that Court emerged from a blizzard of untimely submissions with the conviction that no expert consensus on the relation between desegregation and white flight had appeared (A-34 n. 29). The Petitioner now returns to the fray with newspaper citations (p. 20). If it considers these, the Court should also consider weighty recent scholarship to the contrary. *Symposium on White Flight* (G. Orfield ed. 1975) (Center for Nat'l Policy Review, Catholic University Law School); Pettigrew & Green, *School Desegregation in Large Cities: A Critique of the Coleman "White Flight" Thesis,* 46 Harv. Ed. Rev. 1 (1976). But this Court should not reevaluate the findings made below, consider evidence not of record, and plunge on this record into the midst of an unresolved dispute

[11] The Court was more willing to consider possible residential instability within Boston, because of the smaller distances involved (75-1445, A. 88, 91).

among social scientists. *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4483 n. 11 (1976).

White flight cannot in any event "be accepted as a reason for achieving anything less than complete uprooting of the dual public school system." *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 490-91 (1972); accord, *Monroe* v. *Bd. of Comm'rs*, 391 U.S. 450, 459 (1968).[12] Any other rule would subject desegregation plans to the wishes of white parents, and would require courts to direct their attention to keeping whites in cities, as opposed to remedying constitutional violations by eliminating segregated schools. See *Milliken* v. *Bradley*, 418 U.S. 717, 746-47, 756 n. 2 (1974).[13]

Even were "white flight" proven and relevant, it would have no bearing on this case. Any attempt to use "white flight" considerations to choose between desegregation plans would require assessment of their different impact on white flight, a task which seems wholly impracticable (A-36 n. 30). The Petitioner did not argue to the District Court that "white flight" considerations supported its own plan, which had been rejected by that court before "white flight" was raised as an issue. Nor was the plan suggested by the Masters designed on any theory that desegregation and white flight are related, since the Masters found that theory a "misleading fiction" (No. 75-1445, A. 81 n. 7). Surely, after the elaborate litigation that has already occurred, the Petition's arguments do not warrant discarding the plan now in operation in order to plunge anew into the planning process. Even the School Committee's petition (No. 75-1445) does not seek such a result.

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[12] The Court, however, relied on predictions of white flight to prevent dilution of a desegregation plan. *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972). That is not in question here.

[13] *Calhoun* v. *Cook*, 522 F.2d 717 (5th Cir. 1975) (relied on by the Petition, p. 21) is distinguishable. The court there relied on the fact that the school system *already* had an 85% black student body and a majority black faculty, administration and school board to conclude that equal educational opportunity did not require extensive further desegregation; it made no reference to white flight.

Nor does the operation of the present plan constitute a basis for review. Desegregation has not been trouble-free in Boston, but the vast majority of Boston's one hundred-sixty some schools are working realistically on a constitutional basis. There have been well-publicized difficulties at a relative handful of schools, but those difficulties do not stem from the plan. Rather, they stem from incessant attacks upon desegregation, the courts and the law itself by some private persons and some public officials who would have the Constitution and the rule of law honored in Topeka and Little Rock but not in Boston.

Conclusion

The violation trial in this case was litigated with much vigor, and resulted in comprehensive findings of fact (379 F. Supp. 410) which were upheld on appeal (509 F.2d 580, *cert. denied*, 421 U.S. 963). The plain consequence of those findings, under well-established principles laid down by this Court, was that "root and branch" desegregation was required in Boston. New parties opposed to that result have sought to avoid it, both by challenging the violation findings in hindsight and by proposing new—or rather, old and rejected—remedial principles. This Petition in particular calls on this Court to reopen findings concurred in by two courts at the violation stage (pp. 15-16), to reject the standards for constitutional violations recognized in *Keyes* (pp. 13-14), and to abandon the requirements of *Green*, *Swann* and *Davis* (p. 19). These proposals, inappropriate in any event, are singularly so here, in light of the pervasiveness of the constitutional violation (379 F. Supp. 410), the total default and obstruction of the

school authorities (A-3-4, 13, 49-50, 56-57), the practicability of the District Court's plan (No. 75-1445, A. 85-86, 90-92, 184-87; A-20, 39-40), and the limits on the Petitioner's intervention. The Petition's theories, moreover, are built on an assertion about the prior course of this litigation rejected below as "utterly without merit" (A-32 n. 26) and a constitutionally irrelevant sociological theory that is questioned even by sociologists (A-34 n. 29).

The plan adopted by the District Court reflects careful and sensitive considerations of the constitutional violations found in Boston, the decisions of this Court, and the practical problems of desegregation. Attacked from three sides at once, it was affirmed by the Court of Appeals in a thorough opinion by Chief Judge Coffin. Nothing even close to an abuse of discretion can be shown, much less a case requiring this Court's consideration. Certiorari should therefore be denied.

Respectfully submitted,

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APPENDIX

The segregation which concededly existed in the Boston public schools was found by the District Court to have been intentionally caused by the defendants. 379 F. Supp. at 424-25, 480-82. This finding parallelled similar findings by the U.S. Department of Health, Education and Welfare, the Massachusetts Commission Against Dscrimination, and the state courts. 379 F. Supp. at 418-21, 431, 450-51. Some but not all the facts supporting the District Court's findings are summarized below.

1. At more than 25 schools, officials packed students into overcrowded segregated schools or maintained vacant seats at other segregated schools, rejecting remedies which would have reduced segregation because of white opposition even though these very remedies were freely used when they would not desegregate. 379 F. Supp. at 425-27. Hundreds of white students from outside South Boston, for instance, attended overcrowded, all-white South Boston High. 379 F. Supp. at 475.

2. More than 40 portable classrooms were placed so as to keep students in segregated schools, while proposals for desegregative placement of portables were rejected with the assertion that portables are "educationally undesireable." 379 F. Supp. at 427-28.

3. At least 18 out of 20 new facilities built or converted without state scrutiny opened segregated; proposals (made under state financial pressure) to open unsegregated schools were resisted and evaded. 379 F. Supp. at 428-32. The school department bought a building in a 98% white residential area, and created a 7% white school there by busing in black students. 379 F. Supp. at 429. Knowing that public housing projects were segregated, officials systematically built small schools within or near them,

ensuring that the schools would also be segregated. 379 F. Supp. at 470-73.

4. School officials maintained school district lines for tens of schools which were inexplicable in terms of distance or safety factors, but which coincided with racial residence patterns. 379 F. Supp. at 433-47. While adopting district changes that increased or continued segregation, officials rejected all proposals for redistricting with desegregative effects, and sabotaged commitments to desegregative redistricting forced on them under state law. 379 F. Supp. at 433, 437-41.

5. School officials established and changed "feeder patterns" affecting promotion from one school to another, creating or maintaining segregation at about numerous high, junior high and middle schools. 379 F. Supp. at 441-449.

6. Throughout the city, the defendants maintained a student transfer policy which enabled thousands of students to leave schools in which their race was in the minority — a use openly defended by school Committee members — and which was discriminatorily administered. 379 F. Supp. at 449-453. When forced by financial pressure to discontinue this practice, the defendants honeycombed the replacement with segregative exceptions, one deliberately concealed from state officials. 379 F. Supp. at 452-56.

7. Again throughout the city, school officials deliberately segregated teachers, and used policies concentrating inexperienced teachers in black schools. 379 F. Supp. at 459-63. They also discriminated in hiring and promotion. 379 F. Supp. at 463-66. Such practices imposed a racial stamp on every school in the city.

8. School officials segregated Boston's three "elite" high schools, and vocational programs at about five other schools. 379 F. Supp. at 466-69. Of all the segregative practices described so far, this is the only one for which

the District Court found relied even in part upon the presumptions set forth in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973); in other areas, direct evidence of segregative intent and effect sufficed. 379 F. Supp. at 481. Even in this area, the Court's conclusion was buttressed by substantial further evidence. 379 F. Supp. at 469; 509 F.2d at 594.

9. The School Committee's "neighborhood school policy" was "so selective as hardly to have amounted to a policy at all." More than a third of the students used transportation to reach school. 379 F. Supp. at 429, 456 n. 31, 475. "The neighborhood school has been a reality only in areas of the city where residential segregation is firmly entrenched." 379 F. Supp. at 473.

10. The effects of the School Committee's segregative actions could not be limited to any section of the city, but were system-wide. 379 F. Supp. at 474-76, 481-82. The record as a whole, moreover, strongly supported the Court's finding of segregative intent. 379 F. Supp. at 479-80. Ultimately, relying on *Keyes*, the Court found the whole system unconstitutionally segregated. 379 F. Supp. at 482.

The segregative practices found in this case, in sum, were far more extensive than those in *Keyes*, where, out of 119 schools, only 8 were found directly affected. 413 U.S. at 191-92, 199 n. 10. The Court there made clear that —in the absence of rebuttals by the defendants—such a showing could support systemwide violation findings and relief. 413 U.S. at 203-04, 209-09, 213-14. Since no plausible rebuttal was made by the defendants here (379 F. Supp. at 467), it was the inescapable mandate of *Keyes* that the School Committee "has the affirmative duty to desegregate the entire system 'root and branch.' " 413 U.S. at 213.